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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination protects the contents of an individual's voluntarily prepared financial records.

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UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is not yet reported. The opinion of the district court (App., *infra*, 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 16a) was entered on September 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *

STATEMENT

1. A federal grand jury in Alexandria, Virginia, is investigating a variety of narcotics, tax, and currency violations believed to have occurred from 1974 to the present. Respondent is a target of the investigation, which is currently exploring evidence that he and others distributed large quantities of marijuana and hashish in the Eastern District of Virginia and elsewhere in the United States. Internal Revenue Service agents are assisting the investigation to determine, inter alia, whether respondent's participation in the narcotics enterprise yielded unreported income. See App., *infra*, 2a.

In March 1984, the grand jury caused a subpoena to be served on respondent directing him to appear before the grand jury on April 17, 1984, and to bring with him a variety of documents (App., *infra*, 17a-20a). The items demanded encompass approximately a dozen kinds of common financial records, including records of real estate transactions, bank statements, cancelled checks, loan agreements, brokerage account records, and credit card receipts. The subpoena also required respondent to furnish records of payments made to attorneys, funds deposited with attorneys or law firms, and records of the purchase, sale, or distribution of controlled substances, including documents naming suppliers and customers. In addition, the subpoena demanded production of financial records maintained by respondent's businesses, including sole proprietorships.

Respondent agreed to furnish the records of his businesses, but he moved to quash the remainder of the subpoena, asserting (1) that it was overbroad and sought production of material irrelevant to the investigation and (2) that the required production of "personal" records violated his Fifth Amendment privilege

against self-incrimination. See C.A. App. 7-8. The government responded by offering act-of-production immunity with respect to the records covered by the claims of privilege. See App., *infra*, 1a-2a, 5a. The district court rejected respondent's argument concerning overbreadth and irrelevance. However, the court granted the motion to quash that part of the subpoena requiring respondent to produce "his personal, as opposed to his business[] records" (App., *infra*, 13a). In response to the government's argument that the contents of preexisting records are not protected by the Fifth Amendment privilege, as interpreted in *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), the court stated (App., *infra*, 13a n.1) that *Doe* "concerned only business records." The court observed (*ibid.*) that "the logical extension" of *Doe* "is to exempt private papers from Fifth Amendment protection." The court acknowledged that *Boyd* v. *United States*, 116 U.S. 616 (1886), which held that the contents of "private papers" are protected by the Fifth Amendment privilege, had been "discredited insofar as business records are concerned" (App., *infra*, 13a n.1), but it nevertheless felt "obliged" to follow *Boyd* until it was expressly overruled.

The court directed respondent to furnish for in camera inspection a list of all documents asserted to be personal, together with sufficient identification to enable the court to determine whether each listed document was a "personal" or a "business" record. See App., *infra*, 13a. At the same time, and at the government's unopposed request, the court granted respondent formal immunity for the act of producing the documents, pursuant to 18 U.S.C. 6002 and 6003. C.A. App. 57-58; see App., *infra*, 1a-2a, 5a.

Following its inspection of the list respondent furnished, the court concluded that the documents designated were "clearly * * * personal" and therefore exempt from production to the grand jury (App., *infra*, 13a). The court noted that, ironically, "many of the documents consist of checks, vouchers or [other] documents, the original or copies of which are in the hands of third parties. These probably could be obtained from the third parties by a grand jury subpoena if the government knew their whereabouts" (App., *infra*, 13a-14a).[1]

2. The court of appeals affirmed (App., *infra*, 1a-12a), relying (*id.* at 7a) on "the long-standing holding of the Supreme Court, first enunciated in *Boyd*." The court noted that *Boyd* had refused to recognize any substantial difference between the "seizure of a man's private books and papers" and "compelling him to be a witness against himself." App., *infra*, 8a-9a, quoting *Boyd*, 116 U.S. at 633. The court then quoted *Boyd*'s statement (116 U.S. at 634-635) that "compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution." App., *infra*, 9a.

The court of appeals observed (App., *infra*, 9a) that statements in several decisions of this Court, culminating with the decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), "reaffirmed *Boyd*'s essential holding." The court then stated (App., *infra*, 10a) that "[n]o later decision of the Supreme Court has held to the contrary on the point directly in issue" and that none of this Court's more recent decisions "has overruled *Boyd*."

---

[1] The district court did not, however, regard the availability of respondent's personal papers to third parties as constituting a waiver of respondent's Fifth Amendment privilege (App., *infra*, 14a).

Specifically, the court believed that "dicta" in *Fisher* v. *United States*, 425 U.S. 391 (1976), and *Doe* did not require a different result, because "[t]he *Fisher* Court took pains to distinguish *Boyd*," while *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege." App., *infra*, 10a.

The court rejected the government's argument that the subpoenaed documents were not personal in any meaningful sense and were indistinguishable from the financial records at issue in *Doe*. The court did not disagree with the proposition that the records were essentially identical to the proprietor's records in *Doe*, but it declined "to engage in a case-by-case content-based determination of the privacy interest attendant to a given document. The proper line, we feel, has been drawn—whether the documents are held in an individual or representative capacity" (App., *infra*, 11a n.12).

REASONS FOR GRANTING THE PETITION

This case presents an important and frequently recurring question regarding the scope of the Fifth Amendment privilege against compelled self-incrimination when an individual's voluntarily prepared business or financial records are subpoenaed. In holding that the privilege could ever protect the contents of such documents and in fact did so here, the court of appeals refused to heed this Court's unambiguous teaching in *Fisher* and *Doe*, preferring instead the thoroughly discredited view of the Fifth Amendment privilege derived from *Boyd*. Not only is the decision "in conflict with applicable decisions of this Court" Sup. Ct. R. 17.1(c)), but the court of appeals' error is of considerable practical importance because the financial records of individuals are often of great value in detecting and investigating crime and are therefore subpoenaed fre-

quently. Prompt correction of the court of appeals' decision is accordingly needed.

1. The court of appeals held that the Fifth Amendment privilege protects the contents of voluntarily prepared business records. This view of the privilege was emphatically rejected by this Court in *Fisher* and *Doe*.

In *Fisher*, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of the documents was prepared by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on the ground of attorney-client privilege because the Fifth Amendment would not have prevented compelled disclosure of the documents if they had remained in the possession of the taxpayers themselves. The Court explained (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court went on to stress that the Fifth Amendment does not protect any privacy interest in the contents of documents even when the documents have been written by the person asserting the privilege (425 U.S. at 410 n.11). Rather, the Court observed, the

privilege applies only when the accused is compelled to make a testimonial communication that is incriminating (*id.* at 399, 408), and therefore "unless the Government has compelled the subpoenaed person to write the document * * * the fact that it was written by him is not controlling with respect to the Fifth Amendment issue" (*id.* at 410 n.11). The Court recognized (*id.* at 410), however, that in some circumstances the compelled act of producing a document pursuant to subpoena might be considered the equivalent of incriminating testimony—either because the act concedes "the existence of the papers demanded and their possession or control by the taxpayer" or because it serves to authenticate them.

Fisher's explication of the Fifth Amendment privilege made perfectly clear that while the act of producing a document might in some circumstances be tantamount to "testimony" within the protection of the privilege, a person cannot avoid compliance with a documentary subpoena based solely upon the contents of a document that was not prepared under government compulsion. However, while *Fisher*'s reasoning had implications extending far beyond the particular situation in that case, the Court concluded its opinion by stating (425 U.S. at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States*, 116 U.S., at 634-635.

Seizing on this passage, several lower courts held that the Fifth Amendment privilege shielded the contents of voluntarily prepared records under a "protection-of-private-papers principle" derived from *Boyd*. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 332-333 n.7 (3d Cir. 1982), rev'd in part and aff'd in

part *sub nom. United States* v. *Doe*, No. 82-786 (Feb. 28, 1984); see also *United States* v. *Miller*, 660 F.2d 563, 566-567 (5th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), cert. denied, 454 U.S. 862 (1981). We therefore petitioned for certiorari in *Doe* to resolve the question "whether the Fifth Amendment protects the contents of an individual's business records" (82-786 Pet. 9).

The Court granted review and unambiguously answered that question, holding that the contents of such records are not protected. The Court wrote (*United States* v. *Doe*, slip op. 5-7; footnotes omitted):

> The Court in *Fisher* expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The rationale underlying our holding in that case is, however, persuasive here. As we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination. 425 U.S., at 396. Where the preparation of business records is voluntary, no compulsion is present.
>
> * * * * *
>
> Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Justice O'Connor filed a separate concurring opinion "to make explicit what [was] implicit in the [Court's] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." See *United States* v. *Doe*, *supra*.

Although three members of the Court dissented in part, none suggested that the contents of voluntarily

prepared business records enjoy any Fifth Amendment protection. In fact, Justice Marshall, joined by Justice Brennan, pointedly noted (*United States* v. *Doe*, slip op. 2; footnotes omitted) that "the documents at stake here are business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries."

2. The court of appeals gave two reasons for refusing to follow the teaching of *Fisher* and *Doe*. First, the court chose to follow *Boyd*'s conflicting interpretation of the Fifth Amendment privilege because this Court has never expressly overruled *Boyd*. But while this Court has not overruled *Boyd* in so many words, it has left no doubt that *Boyd*'s interpretation of the Fifth Amendment is erroneous and should not be followed. In *Fisher*, the Court noted (425 U.S. at 408) that "[t]he pronouncement in *Boyd* that a person may not be forced to produce his private papers has * * * often appeared as dictum in later opinions of this Court." However, the Court explained (425 U.S. at 409) that "the foundations for the rule have been washed away." The Court added (*ibid.*):

> In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony" that incriminates him.

The Court also expressly rejected the argument, which the court of appeals in this case adopted (see App., *infra*, 11a-12a), that the Fifth Amendment privilege was intended to protect privacy in a generalized way. The *Fisher* court wrote (425 U.S. at 399; footnote omitted):

> Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the

> Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

Decisions of this Court holding that an individual's papers may be seized pursuant to a search warrant (*Andresen* v. *Maryland*, 427 U.S. 463 (1976)) and that testimony otherwise protected by the Fifth Amendment may be compelled pursuant to a grant of immunity (*Kastigar* v. *United States*, 406 U.S. 441 (1972)) also leave no room to argue that the Fifth Amendment privilege exists for the independent purpose of protecting personal privacy.

Following *Fisher*, *Doe* further confirmed *Boyd*'s demise. Faced with a court of appeals' decision that "continued to recognize *Boyd*'s protection-of-private-papers principle" (680 F.2d at 332-333 n.7), the Court again made clear that this view of the Fifth Amendment privilege had been discredited (*United States* v. *Doe*, slip op. 5-6 & nn.8, 10). The Court noted (slip op. 7 n.10) that *Andresen* had "dismissed" the argument that dicta from later cases continued to support *Boyd*. And, the Court continued (*ibid.*):

> Although *Andresen* involved a search warrant rather than a subpoena, the underlying principle is the same in this context. If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.

The court of appeals' second reason for refusing to apply *Doe* was that *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege" (App., *infra*, 10a). It is abundantly clear, however, that *Doe* did not treat the indi-

vidual whose business records were subpoenaed in that case as an "artificial entity." Nowhere in the Court's opinion is there a hint of a distinction between the records of a sole proprietorship and an individual's business records. On the contrary, the Court referred interchangeably to the records in *Doe* as "the business records of a sole proprietorship" (*United States* v. *Doe*, slip op. 1) and "his [*i.e.*, the respondent's] business records" (slip op. 11 & n.17). Moreover, the Court held that the act of producing the subpoenaed records in *Doe* was privileged even though this Court's cases firmly established that the custodian of the records of an "artificial entity" such as a corporation or partnership, may not resist a documentary subpoena on act-of-production grounds. See *Fisher*, 425 U.S. at 408, 413. If the Court had regarded the sole proprietorship as an "artificial entity," then the act of production would not have been privileged.

In any event, the court of appeals' description of a sole proprietorship as an "artifical entity" (App., *infra*, 10a) is flatly wrong, and its distinction between the business records of a sole proprietorship and an individual's business or financial records makes no sense. A sole proprietorship is not an artificial entity; it "has no legal existence apart from its owner." *In re Grand Jury Empanelled February 14, 1978*, 597 F.2d 851, 859 (3d Cir. 1979). "Sole proprietorship" is simply a term used to describe a business conducted by a person in his personal capacity rather than through a partnership or corporation. The assets and debts of the sole proprietorship are those of the individual owner and vice versa. The sole proprietorship dies with the owner. The sole proprietorship does not pay taxes or even file a separate tax return; instead, its income is taxable to the owner. A person who owns a sole proprietorship is under no obligation to separate records relating directly to his business from any of his other financial records.

Nor is a person who owns several separate businesses that are run as sole proprietorships required to segregate the records of each. In such situations, all of the assets, liabilities, and documents reflecting them are regarded for virtually all legal purposes—*e.g.*, taxes, creditors' rights, inheritance, alimony and child support—as those of the individual.

Even where the individual segregates the records of his businesses, as may be true in this case, it makes no sense to distinguish between the records of a sole proprietorship and the business or financial records of the individual. For example, documents showing income received by the individual necessarily show income on which the "sole proprietor" may draw. Likewise, records memorializing the individual's debts necessarily reflect the "sole proprietor's" liabilities. And finally, assuming (as the government suspects) that respondent earns his income from illicit drug transactions and invests the proceeds in, for example, real estate, then he is as much a "sole proprietor" of drug and real estate ventures as the respondent in *Doe* was of his businesses. The distinction sought to be drawn by the court of appeals is thus wholly without substance.

3. Under the logic of *Fisher* and *Doe*, the Fifth Amendment privilege does not protect the contents of any voluntarily prepared documents, whether business-related or purely personal. In our view, any special protection available when purely personal documents, such as a diary, are subpoenaed must find its origin in another constitutional provision, such as the First or Fourth Amendments.[2] In this case, however, that question need not be addressed, because here, as in *Fisher* and *Doe*, only business and financial records are

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[2] For example, as a matter of Fourth Amendment law, it may be appropriate to require an exceptionally high showing of need before government officials may reasonably be permitted to examine the contents of a diary.

sought. The documents at issue—vouchers, bills, checks, etc.—are not of an intimate nature. See *United States* v. *Doe*, slip op. 2 (Marshall, J., dissenting); *Andresen*, 427 U.S. at 486 (Brennan, J., dissenting).[3]

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[3] Indeed, as the district court observed (App., *infra*, 14a), many of the documents are duplicates of documents held by third parties, such as respondent's bank. Accordingly, respondent has no legitimate privacy expectation in the contents of those documents. As the Court explained in *United States* v. *Miller*, 425 U.S. 435, 442-443 (1976), where it was argued that an individual had a legitimate expectation of privacy in records kept by his bank:

> Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

Although *Miller* speaks only of bank records, its teaching applies with equal force to each of the categories of documents at issue in this case. The documents subpoenaed are records of commercial transactions that by their nature require disclosure to third parties, often total strangers. There is simply no reasonable expectation of privacy inherent in documents of this kind.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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NOVEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1527

UNITED STATES OF AMERICA, APPELLANT,

v.

(UNDER SEAL), APPELLEE.

In re: John Doe No. 462

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
AT ALEXANDRIA
ALBERT V. BRYAN, JR., DISTRICT JUDGE (GJ 38-2)

Argued July 11, 1984
Decided September 24, 1984

Before PHILLIPS, MURNAGHAN and ERVIN, *Circuit Judges.*

PHILLIPS, *Circuit Judge:*

The United States appeals from the district court's order quashing, on fifth amendment grounds, a portion of a grand jury subpoena directing appellee to produce specified records and papers held by him in an individual capacity.[1] The district court, relying on *Boyd* v. *United States*, 116 U.S. 616 (1886), held that the fifth amendment prevented the government from subpoenaing incriminating personal documents, notwithstanding the fact that appellee was given immunity for the

[1] Our jurisdiction is based on 18 U.S.C. § 3731.

implicit "testimony" involved in the act of producing the documents. On this appeal, the government argues that the judgment of the district court should be reversed because, it contends, the fifth amendment does not protect an individual against the compelled disclosure of the *contents* of incriminatory documents or papers, no matter how personal or private they may be. Because we believe that the Supreme Court's decision in *Boyd* is contrary to the position urged by the government, we affirm the judgment of the district court.

I

In March 1984, on application of the assistant United States Attorney, the federal grand jury sitting in the Eastern District of Virginia issued a subpoena duces tecum to appellee, who is a target of the grand jury's investigation into certain alleged narcotics, tax and currency violations. The subpoena required appellee to produce specified "personal records" for the period extending from January 1, 1975 to the date of the subpoena's issuance. Included within the scope of the subpoena were "'records of purchases, trades, sales, receipts, gifts and distributions of controlled substances."[2] On April 10, 1984, appellee filed a motion to

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[2] Item J of the grand jury subpoena required appellee to produce records of sole proprietorships. Appellee did not assert a fifth amendment privilege as to these documents and fully complied with Item J. *Cf. United States* v. *Doe*, 52 U.S.L.W. 4296 (U.S. Feb. 28, 1984) (records of sole proprietorship not protected by fifth amendment). Appellee also turned over all corporate documents subpoenaed by the grand jury. The critical document-identifying text of the subpoena at issue in this case is as follows:

> I. Personal records of [appellee] for the period January 1, 1975 through present (unless a different period is specified elsewhere*):
>
> A. 1975 income tax returns
>
> B. Records of real estate transactons, including but not limited to:
>
> 1. Sales contracts/purchase agreements

quash that portion of the subpoena requiring him to produce documents held by him in an individual capac-

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2. Financial statements
3. Settlement sheets
4. Deeds
5. Deeds of trust
6. Mortgages/promissory notes

C. Bank records, savings and loan records, credit union records, including but not limited to:

1. Checking account statements, cancelled checks, deposit tickets, debit memos, credit memos
2. Savings accounts statements, withdrawal slips, deposit tickets, debit memos, credit memos, interest statements
3. Retained copies of cashier's checks, money orders, wire transfers
4. Certificates of deposit and money market certificates, statements of account

D. Records of loans received/made, including but not limited to:

1. Applicatons
2. Financial statements
3. Notes
4. Security agreements/collateral agreements
5. Repayment records
6. Interest statements

E. Records of brokerage accounts, including but not limited to:

1. Applications
2. Financial statements
3. Monthly/quarterly statements
4. Purchase orders, purchase confirmation slips
5. Sell orders, sales confirmation slips
6. Cash receipts
7. Receipts of securities delivered or received
8. Stocks
9. Dividend statements
10. Interest statements
11. Cpital gains losses statements

*F. Records of all gifts *ever* received or made in excess of $200.

*G. Records of all inheritances *ever* received

H. Records of purchases and sales of assets or expenditures in excess of $200, including but not limited to:

1. Payment records
2. Invoices, statements
3. Titles, lease agreements

ity. He argued, first, that the subpoena was overbroad, and irrelevant to the grand jury's investigation, and, second, that the compelled production of personal rec-

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4. Importation and duty records
5. Appraisals, certificates of authenticity
6. Contracts, purchase agreements, bills of sale
7. Insurance and annuity policies

I. Records of credit cards, including but not limited to:

1. Monthly statements
2. Charge receipts

J. Records of businesses (sole proprietorships), including but not limited to:

1. Cash disbursement records
2. Cash receipts records
3. Client/customer name, address and telephone records
4. Inventory records
5. Employment records, employees names and address records, Forms W-2, payroll records, payroll tax records and returns
6. Invoices
7. Receipts
8. Shipping and delivery records
9. Lease agreement
10. Bank records (see I.C.)
11. Loan records (see I.D.)
12. Records of purchases of business assets and business expenditures (see I.H.)
13. Credit card records (see I.I.)
14. Records of sales of business assets

K. Records of payments of legal fees, retainers and monies deposited with lawyers and/or law firms, including but not limited to records of: payees, addresses of payees, amounts and dates of payments.

L. Records of purchases, trades, sales, receipts, gifts and distributions of controlled substances as defined by Title 21, United States Code, Sections 811 and 812, for the period January 1, 1970 through the present, including but not limited to:

A. Documents reflecting the names, addresses and telphone [sic] numbers of customers, sellers, traders, suppliers, importers, distributers [sic], transporters, drivers, storers and all other persons and/or entities involved in the acquisition, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.

B. Documents reflecting expenses of acquisition, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.

ords violated his fifth amendment right not to incriminate himself.

Following a hearing on April 13, 1984, the district court granted the motion to quash "to the extent that the subpoena calls for the production of personal records of appellee."[3] The court directed counsel for appellee to submit for the court's *in camera* inspection a list of the documents that were asserted to be "personal." At the same time, at the government's request, the court granted appellee immunity for the act of producing the documents.[4]

After reviewing the submitted description, the district court concluded that the documents were "clearly personal," and therefore were protected by the fifth amendment. The court ordered the *in camera* submission sealed until further order of the court,[5] and the United States noticed an appeal from this order.[6]

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[3] The district court rejected appellee's contentions concerning the relevance and overbreadth of the subpoena. That finding is not challenged on appeal.

[4] The application of the United States was submitted pursuant to 18 U.S.C. §§ 6002 & 6003. the immunity order stated that 'the fact of [appellee's] compliance with the aforedescribed subpoena may not be used against [appellee] in any criminal case, except in a prosecution for perjury, false statements or failing to comply with this Court's ORDER OF IMMUNITY."

[5] The district court noted that "many of the documents consist of checks, vouchers or documents, the original or copies of which are in the hands of third parties." The court thought it "ironic" that the government could subpoena these documents from the relevant third parties, but held that no waiver of appellee's fifth amendment right occurred when the documents were released to those individuals. We agree.

[6] Appellee contends that the United States should have appealed from the earlier April 13 order and that its failure to do so resulted in the untimely filing of the notice of appeal. The April 13 order, however, did not determine which documents were "personal" but merely directed appellee to submit to the court a list of documents that were asserted to be personal. Not until the April 19 order did the government know whether *any*

II

The government contends that the district court should be reversed because the fifth amendment does not protect appellee from the subpoena of his personal documents. Specifically, the United States argues that no fifth amendment privilege attaches to the *contents* of pre-existing documents of any kind. Although the government admits that subpoenaed documents constitute "testimonial evidence," it contends that the fifth amendment does not come into play because the individual's voluntary choice, not governmental compulsion, results in the incriminating documentary "testimony." Since the incriminating testimony is not *itself* compelled, so the argument goes, there is no constitutional right that prevents its disclosure to the government, even though the disclosure is unquestionably the result of government compulsion.

In line with this view, the government contends that the fifth amendment places no limits on govrnmental intrusion into an individual's private affairs, other than a narrow proscription against the extortion of testimony. *Cf.* 8, Wigmore, *Evidence* § 2263 (McNaughton rev. 1961) (privilege "directed at the employment of legal process to extract from the person's own lips an admission of guilt"). An individual's "right to privacy" is thus left protected in a constitutional sense only by the conditional limits set by the fourth amendment.[7] Be-

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documents were to be considered privileged. We therefore hold that the April 19 order was the proper final order from which to appeal.

[7] The fourth amendment places few constraints on the government's subpoena power. Notably, there is no requirement that the government have "probable cause" before subpoenaing documents or any other items. *See Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209 (1946). As to subpoenas, the fourth amendment guards primarily against too much indefiniteness or breadth of the subpoena and imposes a requirement

cause we believe that the government's argument is inconsistent with the long-standing holding of the Supreme Court, first enunciated in *Boyd*, we affirm the order of the district court quashing the subpoena on fifth amendment grounds.

Boyd v. *United States*, 116 U.S. 616 (1886), involved a forfeiture action brought by the United States against thirty-five cases of plate glass, allegedly imported without the payment of import duties. In the course of the action, the district court entered an order[8] requiring the claimants of the glass to produce an invoice from the exporter. The Supreme Court held that the district court's order, and the statute pursuant to which it was entered, violated both the fourth and fifth amendments. Noting that the district court's order went even further than "the Act under which the obnoxious writs of assistance were issued," *id.* at 623, the Court first held that "a compulsory production of a man's private papers to establish a criminal charge against him" *id.* at 622, violates the fourth amendment's proscription against

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that the subpoenaed items be relevant. *See id.; United States* v. *Dionisio*, 410 U.S. 1 (1973). The Supreme Court has also rejected the contention that a subpoena to obtain records should be subject to more stringent fourth amendment requirements than other items: "A subpoena *duces tecum* issued to obtain records is subject to no more stringent fourth amendment requirements than is the ordinary subpoena." *United States* v. *Miller*, 425 U.S. 435, 446 n.8 (1976) (business records of bank).

The substantive limits placed on government by the due process clause also unconditionally protect, in a few instances, the privacy of the individual. *See, e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[8] The statute pursuant to which the order was entered provided that the failure of the individual to produce the records designated by the government's motion resulted in the allegations stated in the motion being taken as true. *See Boyd*, 116 U.S. at 619-20.

unreasonable searches and seizures.[9] Observing that both the fourth and fifth amendments protect an individual's right to privacy, the Court declared that the prohibition against the forced production of private papers involves "the very essence of constitutional liberty and security."

> It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where the right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Id. at 630.

A contrary reading of the Constitution, *Boyd* noted, might "suit the purposes of despotic power," but it conflicts with "the pure atmosphere of political liberty and personal freedom" enjoyed in this country. *Id.* at 632. The Court was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling

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[9] In an effort to distinguish the unreasonable search at issue in *Boyd* from searches for contraband, which the common law regarded as "reasonable," the Court noted that in the latter situation the government possessed a superior property right in the items searched for. In *Warden* v. *Hayden*, 387 U.S. 294 (1967), the Supreme Court rejected the notion that the reasonableness of a search depended upon whether the items sought were "mere evidence" of a crime, or constituted "fruits and instrumentalities" of the crime.

him to be a witness against himself." *Id.* at 633. As a consequence, *Boyd* explicitly held that "a compulsory production of the private books and papers of the owner of the goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution."[10] *Id.* at 634-35.

Later Supreme Court decisions have reaffirmed *Boyd*'s essential holding. *See, e.g., Bellis* v. *United States*, 417 U.S. 85, 87 (1974) ("the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony"); *United States* v. *Calandra*, 414 U.S. 338, 346 (1974) ("grand jury may not compel a person to produce books and papers that would incriminate him"); *United States* v. *Dionisio*, 410 U.S. 1, 11 (1973) (grand jury "cannot require the production by a person of private books and records that would incriminate him");[11]

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[10] The "owner" of the document subpoenaed in *Boyd* was a partnership, E.A. Boyd & Sons. In *Bellis* v. *United States*, 417 U.S. 85 (1974), the Supreme Court held that the fifth amendment does not protect the financial records of a partnership. In *Bellis*, however, the Court distinguished *Boyd*, noting that "we do not believe that the Court in *Boyd* can be said to have decided the issue presented today." *See id.* at 95 n.2. As *Bellis* noted, *Boyd* was decided on "the premise that it involved the 'compulsory producton of a man's private papers.'" *Id.* (quoting *Boyd*, 116 U.S. at 622).

[11] The minimal fourth amendment constraints placed on the government's subpoena power, *see supra* note 7, have always been assessed in conjunction with the fifth amendment's traditional protection of the individual's private papers. In *Dionisio*, for instance, the Supreme Court rejected a fourth amendment challenge to a grand jury subpoena, but noted that the fifth amendment prevented the government from requiring a person to produce incriminating private books and records. *See* 410 U.S. at 11.

Under the view advocated by the government in this case, a grand jury could subpoena an individual's personal diary on the

Schmerber v. *California*, 384 U.S. 757, 763-64 (1966) (fifth amendment reaches "compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers"); *United States* v. *White*, 322 U.S. 694, 699 (1944) (privilege "protects the individual from any disclosure, in the form of ... documents, sought by legal process against him as a witness").

No later decision of the Supreme Court has held to the contrary on the point directly in issue. The government here relies on dicta in several recent decisions of the Court to support its view. The dicta are assuredly there, but none of these decisions has overruled *Boyd*.

The Supreme Court's decision in *Fisher* v. *United States*, 425 U.S. 391 (1976), which the government contends resulted in the "peaceful interment" of *Boyd*, involved a subpoena issued to a third party for the production of business records which were not written by the proponent of the privilege. The *Fisher* Court took pains to distinguish *Boyd*, and explicitly reserved judgment on the question presented here—whether the compelled production of the proponent's own papers would violate the Constitution. *See* 425 U.S. at 414. Other cases relied upon by the government merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege. *See United States* v. *Doe*, 52 U.S.L.W. 4296 (U.S. Feb. 28, 1984) (sole proprietorship); *United States* v. *Fishman*, 726 F.2d 125 (4th Cir. 1983) (sole proprietorship). *See also Andresen* v. *Maryland*, 427 U.S. 463 (1976) (search for

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bare ground that it was in some way "relevant" to a broad-based investigation being conducted by the grand jury. If this were allowed, a grand jury subopena would indeed have become a "talisman that dissolves all constitutional protections." *Dionisio*, 410 U.S. at 11.

business records of law office does not violate fifth amendment).

III

Among other things, the fifth amendment evinces "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'" *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964) (quoting *United States* v. *Grunewald*, 233 F.2d 556, 581-82 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)). *See also Bellis*, 417 U.S. at 91-92; *Couch* v. *United States*, 409 U.S. at 327. The fundamental teaching of *Boyd* is consistent with this purpose: the forced disclosure of private incriminating information jeopardizes the individual's right to keep at least that aspect of himself which is reflected in his private papers free from the intrusive hands of the government.[12] Implicit in the cherished right of the individual to "pursue happiness" is the concomitant right to express one's own thoughts free from the government's exaction of those thoughts

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[12] The government has also argued, in the alternative, that the documents subpoenaed here are not sufficiently "private" to merit the protection of the fifth amendment. Private financial and commercial records, it contends, should not be privileged, even if intimate personal papers are found to be.

We decline, however, to engage in a case-by-case content-based determination of the privacy interest attendant to a given document. The proper line, we feel, has been drawn—whether the documents are held in an individual or representative capacity. Documents held in a representative capacity clearly reflect no privacy expectation on the part of the representative. *See Bellis*, 417 U.S. at 91-92 (unlike personal records, "a substantial claim of privacy or confidentiality cannot often be maintained with respect to the financial records of an organized collective entity"). *See also United States* v. *Davis*, 636 F.2d at 1043 (refusing to alter fifth amendment protection depending on whether documents are "business-related or more inherently personal in content"). *Cf. Boyd* (fifth amendment protects against production of invoice).

upon penalty of one's liberty. We therefore hold, in line with *Boyd*, that the fifth amendment prevents the government from subpoenaing an individual's incriminating papers that are in his possession and are held by him in an individual, as opposed to representative capacity. *Accord United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1044 (3d Cir. 1980). *See also United States* v. *Helina*, 549 F.2d 713 (9th Cir. 1977). *But see In re Grand Jury Proceedings*, 626 F.2d 1051 (1st Cir. 1980) (no protection for personal business records); *United States* v. *Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983) (no fifth amendment protection against disclosure of contents of documents "less private" than personal diary), *cert. denied*, 104 S. Ct. 1591 (1984). Since the documents at issue in this case were held by appellee in his individual capacity, the district court's order quashing the subpoena in part is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE:

GRAND JURY NO. 83-2
JOHN DOE NO. 462

MEMORANDUM OPINION AND ORDER

On April 16, 1984, this court sustained the motion of [John Doe No. 462] to quash that part of a grand jury subpoena which required him to produce his personal, as opposed to his business, records.[1] To enable the court to determine whether the records claimed to be were in fact personal, a listing and description of those recrods were directed to be submitted for in camera review by the court. This has now been accomplished.

An inspection of the list and description reveals the documents clearly to be personal, including copies of [Doe's] tax return.[2] Consequently they need not be produced.

Ironically many of the documents consist of checks, vouchers or documents, the original or copies of which

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[1] At argument the government relied on *United States* v. *John Doe*, 52 U.S.L.W. 4296 (February 28, 1984). While that case concerned only business records, the logical extension of its rationale, as Justice O'Connor points out in her concurring opinion, is to exempt private papers from Fifth Amendment protection. Neither the Supreme Court nor the Fourth Circuit has as yet done that, nor has *Boyd* v. *United States*, 116 U.S. 616 (1886), been expressly overruled, although it has been discredited insofar as business records are concerned. Until it is overruled this court feels obliged to follow it.

[2] Whether the Fifth Amendment is a shield protecting the production of personal tax records was an issue expressly left open in *Fisher* v. *United States*, 425 U.S. 391, 414 (1976).

are in the hands of third parties. These probably could be obtained from the third parties by a grand jury subpoena if the government knew their whereabouts or custodian. That issue is not before the court, however, and the court is not prepared to say that because copies of the private papers are in the hands of others this constitutes a waiver of [Doe's] Fifth Amendment privilege.

The in camera submission shall be sealed until further order of this or a reviewing court.

And it is so ordered.

/s/ [Albert V. Bryan, Jr.]

United States District Judge

Alexandria, Virginia
APRIL 19TH, 1984

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE:

GRAND JURY 83-4
[JOHN DOE NO. 462]

ORDER

Upon consideration of the motion of [John Doe] to quash the grand jury subpoena and for a protective order, it is hereby ORDERED that:

1. The motion to quash is granted to the extent that the subpoena calls for the production of personal records of [John Doe]. In all other respects the motion to quash is denied.

2. Counsel for [John Doe] promptly shall forward to the court for an in camera inspection a listing of those documents which are asserted to be personal records, with sufficient identification of such document to enable the court to make a determination whether it is a personal or business record.

3. The motion of [John Doe] for a protective order is denied.

/s/ [Albert V. Bryan, Jr.]
United States District Judge

Alexandria, Virginia
APRIL 13TH, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1527

UNITED STATES OF AMERICA, APPELLANT

v.

(UNDER SEAL)
JOHN DOE NO. 462, APPELLEE

[Filed Sept. 24, 1984]

JUDGMENT

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
CLERK

APPENDIX E

UNITED STATES COURT
EASTERN DISTRICT OF VIRGINIA

U.S. v. John Doe 462
Grand Jury 83-2

SUBPOENA TO TESTIFY BEFORE GRAND JURY

To:

[John Doe],

Subpoena for:

☒ Person
☒ Document or Object

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the location, date, and time specified below to testify before the Grand Jury in the above entitled case.

Place:

200 S. Washington Street
Alexandria, VA 22314

Courtroom:

Grand Jury Room

Date and Time:

April 17, 1984 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See attached

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk: W. FARLEY POWERS, JR. DATE: 3/22/84

This subpoena is issued on application of the United States of America by:

Karen P. Tandy
Assistant United States Attorney
701 Prince Street
Alexandria, VA 22314
703-557-9100

I. Personal records of [John Doe] and [Jane Doe] for the period January 1, 1975 through present (unless a different period is specified elsewhere*):

A. 1975 income tax returns

B. Records of real estate transactions, including but not limited to:

1. Sales contracts/purchase agreements
2. Financial statements
3. Settlement sheets
4. Deeds
5. Deeds of trust
6. Mortgates/promissory notes

C. Bank records, savings and loan records, credit union records, including but not limited to:

1. Checking account statements, cancelled checks, deposit tickets, debit memos, credit memos
2. Savings accounts statements, withdrawal slips, deposit tickets, debit memos, credit memos, interest statements
3. Retained copies of cashier's checks, money orders, wire transfers
4. Certificates of deposit and money market certificates, statements of account

D. Records of loans received/made, including but not limited to:

1. Applications
2. Financial statements
3. Notes
4. Security agreements/collateral agreements
5. Repayment records
6. Interest statements

E. Records of brokerage accounts, including but not limited to:

1. Applications
2. Financial statements

3. Monthly/quarterly statements
4. Purchase orders, purchase confirmation slips
5. Sell orders, sales confirmations slips
6. Cash receipts
7. Receipts of securities delivered or received
8. Stocks
9. Dividend statements
10. Interest statements
11. Capital gains losses statements

*F. Records of all gifts *ever* received or made in excess of $200

*G. Records of all inheritances *ever* received

H. Records of purchases and sales of assets or expenditures in excess of $200, incuding but not limited to:

1. Payment records
2. Invoices, statements
3. Titles, lease agreements
4. Importation and duty records
5. Appraisals, certificates of authenticity
6. Contracts, purchase agreements, bills of sale
7. Insurance and annuity policies

I. Records of credit cards, including but not limited to:

1. Monthly statements
2. Charge receipts

J. Records of business (sole proprietorships), including but not limited to:

1. Cash disbursement records
2. Cash receipts records
3. Client/customer name, address and telephone records
4. Inventory records
5. Employment records, employees names and address records, Forms W-2, payroll records, payroll tax records and returns

6. Invoices
7. Receipts
8. Shipping and delivery records
9. Lease agreement
10. Bank records (see I.C.)
11. Loan records (see I.D.)
12. Records of purchases of business assets and business expenditures (see I.H.)
13. Credit card records (see I.I.)
14. Records of sales of business assets

K. Records of payments of legal fees, retainers and monies deposited with lawyers and/or law firms, including but not limited to records of: payees, addresses of payees, amounts and dates of payments

II. Records of purchases, trades, sales, receipts, gifts and distributions of controlled substances as defined by Title 21, United States Code, Sections 811 and 812, for the period January 1, 1970 through the present, including but not limited to:

A. Documents reflecting the names, addresses and telephone numbers of customers, sellers, traders, suppliers, importers, distributors, transporters, drivers, storers and all other persons and/or entities involved in the acquisition, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.

B. Documents reflecting expenses of acquisiton, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.